

1 **LEWIS BRISBOIS BISGAARD & SMITH LLP**
2 THOMAS G. OESTERREICH, SB# 126131
3 E-Mail: Thomas.Oesterreich@lewisbrisbois.com
4 ALALEH T. KHOSROWPOUR, SB# 246538
5 E-Mail: Alaleh.Khosrowpour@lewisbrisbois.com
6 GEOFFREY M. HERSCHE, SB# 310241
7 E-Mail: Geoffrey.Hersch@lewisbrisbois.com
8 650 Town Center Drive, Suite 1400
9 Costa Mesa, California 92626
10 Telephone: 714.545.9200
11 Facsimile: 714.850.1030

7 Attorneys for Defendants MICHELLE
8 ANNE BHOLAT, and THE REGENTS
9 OF THE UNIVERSITY OF
10 CALIFORNIA erroneously named as UC
Regents and UCLA School of Medicine
Family Medicine International Medical
Graduate Program

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

15 | HANNA RHEE.

16 Plaintiff.

17 | VS.

18 MICHELLE ANNE BHOLAT, UCLA
19 SCHOOL OF MEDICINE FAMILY
20 MEDICINE INTERNATIONAL
MEDICAL GRADUATE PROGRAM,
UC REGENTS.

21 || Defendants.

CASE NO. SACV18-00975PA(JC)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION OF DEFENDANTS
MICHELLE ANNE BHOLAT AND
THE REGENTS OF THE
UNIVERSITY OF CALIFORNIA
TO DISMISS OR STAY ACTION
PURSUANT TO RULES 12(b)(1),
12(b)(5), AND 12(b)(6) OF THE
FEDERAL RULES OF CIVIL
PROCEDURE; DECLARATIONS
OF ALALEH T. KHOSROPOUR,
JESSICA RODGERS, ERICA
KATSUYAMA, AND GEOFFREY
M. HERSCHE**

Date: October 15, 2018
Time: 1:30 p.m.
Judge: Hon. Percy Anderson

Trial Date: None Set
Filed: June 4, 2018

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

3 Defendants, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA
4 (“The Regents”), and MICHELLE ANNE BHOLAT (“Dr. Bholat”), bring this
5 motion on the grounds that Plaintiff HANNA RHEE (“Plaintiff”) has not and cannot
6 demonstrate the Court has subject matter jurisdiction to hear this matter. Further, it
7 would be appropriate for this Court to abstain from exercising jurisdiction pursuant
8 to *Younger v. Harris* (1971) 401 U.S. 37 and *Kerotest Mfg. Co. v. C-O-Two Fire*
9 *Equipment Co.* (1952) 342 U.S. 180. Moreover, procedurally, Plaintiff has not
10 sufficiently served Dr. Bholat or The Regents, which independently supports
11 dismissal of this action. Finally, Plaintiff’s Complaint fails to state a claim upon
12 which relief can be granted. Plaintiff brings this action pursuant to 42 U.S.C. § 1983
13 alleging The Regents and Dr. Bholat violated her right to work by filing an
14 Accusation with the Medical Board of California. (See Dkt. No. 1, “Complaint” at p.
15 4–5).

II. STATEMENT OF RELIEF

17 The Regents and Dr. Bholat respectfully request the Court dismiss this action.
18 If, for whatever reason, the Court is not inclined to dismiss the action, Dr. Bholat
19 and The Regents request it be stayed until the state administrative proceedings are
20 concluded and Plaintiff has sought judicial review, if at all, in state court, and the
21 action in the United States District Court for the Eastern District of California has
22 concluded.

III. STATEMENT OF FACTS

A. Investigation and Accusation with the Medical Board of California.

25 Plaintiff obtained a certificate (No A116932) to practice medicine from the
26 Medical Board of California (“MBOC”) on or about May 11, 2011. (See Request for
27 Judicial Notice at Exhibit 1). In or around March 2015, Plaintiff started working at

1 the Orchard Hospital Medical Specialty Center (“Orchard Hospital”) in Gridley,
 2 California. (See Request for Judicial Notice at Exhibit 2, ¶ 2; see also Request for
 3 Judicial Notice at Exhibit 3 p. 6).

4 In May 2015, Orchard Hospital entered into a three-year employment
 5 agreement with Plaintiff. (See Request for Judicial Notice at Exhibit 2, ¶ 10; see
 6 also Request for Judicial Notice at Exhibit 3, p. 10). Sometime between May 2015
 7 and September 2015, Orchard Hospital initiated an investigation of Plaintiff after
 8 receiving a number of complaints from patients and other staff members. (See
 9 Request for Judicial Notice at Exhibit 2, ¶ 11; see also Request for Judicial Notice at
 10 Exhibit 3, p. 9). On September 17, 2015, Plaintiff resigned her privileges at Orchard
 11 Hospital while the investigation was still ongoing. (See Request for Judicial Notice
 12 at Exhibit 2, ¶ 11; see also Request for Judicial Notice at Exhibit 3, p. 9). On
 13 November 16, 2015, Orchard Hospital filed a mandatory report pursuant to
 14 California Business & Professions Code section 805 notifying MBOC of Plaintiff’s
 15 resignation during a pending investigation. (See Request for Judicial Notice at
 16 Exhibit 2, ¶ 11; see also Request for Judicial Notice at Exhibit 3, p. 9).

17 In January 2017, MBOC investigators interviewed Plaintiff in connection
 18 with the report by Orchard Hospital. (See Request for Judicial Notice at Exhibit 2,
 19 ¶¶ 13–14; see also Request for Judicial Notice at Exhibit 3, p. 10). On or about July
 20 18, 2017, Dr. Bholat, an MBOC member, signed an order requiring Plaintiff to
 21 undergo a psychiatric evaluation based on the declaration of Reinhardt Hilzinger,
 22 M.D. HQUI, an MBOC consultant. (See Request for Judicial Notice at Exhibit 2, ¶
 23 18; see also Request for Judicial Notice at Exhibit 3, p. 10). In August 2017,
 24 Plaintiff submitted to a psychiatric examination by Nathan Lavid, M.D. (See
 25 Request for Judicial Notice at Exhibit 2, ¶ 18; see also Request for Judicial Notice at
 26 Exhibit 3, p. 10). On January 9, 2018, MBOC posted an Accusation (Case No. 800-
 27 2015-018187) on their website and Plaintiff received notice of the accusation on

1 January 11, 2018. (See Complaint at p. 4–5; see also Request for Judicial Notice at
 2 Exhibit 2; Request for Judicial Notice at Exhibit 3, p. 11). The Accusation is
 3 currently pending and Plaintiff’s license has not been revoked. (See Request for
 4 Judicial Notice, at Exhibit 1).

5 **B. Plaintiff’s Earlier Complaint in the Eastern District Court.**

6 On January 17, 2018, Plaintiff filed a Complaint (Docket No. 2018CV-00105-
 7 GEB-CMK) in the U.S. District Court for the Eastern District of California against
 8 MBOC, Dr. Bholat, and Orchard Hospital, amongst others. (See Complaint at p. 4–
 9 5; see also Request for Judicial Notice at Exhibit 3). Plaintiff’s Complaint in the
 10 Eastern District asserts several claims under 42 U.S.C. § 1983 for depriving her of
 11 equal protection, violating her right to privacy, violating her right to freedom of
 12 speech, press, and to peaceably assemble, and violating her right to work. (See
 13 Complaint at p. 4–5; see also Request for Judicial Notice at Exhibit 3, pp. 12–15).
 14 On March 5, 2018, Plaintiff filed a Motion for Change of Venue to transfer the
 15 matter to the United States District Court for the Central District of California. (See
 16 Request for Judicial Notice at Exhibit 4).

17 On April 6, 2018, MBOC filed a Motion to Dismiss or Stay the Action
 18 arguing, in relevant part, that Younger abstention applies as the state license
 19 proceedings are still pending, MBOC and those acting on its behalf are immune
 20 from suit under the Eleventh Amendment, and Plaintiff’s Complaint fails to state a
 21 claim upon which relief may be granted. (See Request for Judicial Notice at Exhibit
 22 5).

23 On July 12, 2018, United States Magistrate Judge Craig Kellison (“Judge
 24 Kellison”) issued findings and recommendations on the Motion to Dismiss the
 25 Eastern District Action. (See Request for Judicial Notice at Exhibit 7). Specifically,
 26 Judge Kellison recommended the Court grant the Motion based on *Younger*
 27 abstention and the immunity under the Eleventh Amendment. (See Request for

1 Judicial Notice at Exhibit 7). The same day, Judge Kellison denied Plaintiff's
 2 Motion for Change of Venue to the United States District Court for the Central
 3 District of California finding Plaintiff's contention that Los Angeles is more diverse
 4 culturally, economically, and religiously diverse insufficient. (See Request for
 5 Judicial Notice at Exhibit 8).

6 **C. Plaintiff's Complaint and Insufficient Service of Process.**

7 On June 4, 2018, Plaintiff filed the present action against The Regents and Dr.
 8 Bholat. (See Complaint). Plaintiff's complaint seeks an arbitrary sum of
 9 \$40,000,000 be paid to several nonprofit entities that otherwise are unrelated to this
 10 action. (See Complaint at p. 7). On July 18, 2018, counsel for The Regents and Dr.
 11 Bholat contacted Plaintiff to discuss the Complaint and advised Plaintiff they do not
 12 have authority to accept service on behalf of Dr. Bholat or The Regents. (See
 13 Declaration of Alaleh T. Khosrowpour at ¶¶ 2–3).

14 On or about August 17, 2018, Plaintiff attempted to serve the Summons and
 15 Complaint at the office of counsel for Dr. Bholat and The Regents. (See Declaration
 16 of Jessica Rodgers ¶ 2). At that time, Plaintiff's process server was advised that
 17 counsel for Dr. Bholat and The Regents did not have authority to accept service and
 18 that Plaintiff would need to properly serve the Summons and Complaint. (See
 19 Declaration of Jessica Rodgers at ¶ 2).

20 Around that same time, Plaintiff apparently mailed Dr. Bholat and The
 21 Regents a Notice & Acknowledgement of Receipt at 1111 Franklin Street, 8th Floor,
 22 Oakland, CA 94607-5200. (See Dkt. Nos. 6–8, "Proof of Service"). On August 20,
 23 2017, Plaintiff filed a proof of service as to Dr. Bholat and The Regents based on the
 24 Notice & Acknowledgement of Receipt of the Summons and Complaint. (See Proof
 25 of Service).

26 Plaintiff ignores the fact that Dr. Bholat and The Regents did not return
 27 executed copies nor were any attached to Plaintiff's proof of service as to Dr. Bholat
 28

1 or The Regents. (See Proof of Service; see also Khosrowpour Decl. at ¶ 4). On
 2 August 24, 2017, Plaintiff again attempted to serve the Summons and Complaint at
 3 the office of counsel for Dr. Bholat and The Regents by sending a courier to deliver
 4 copies of the Summons and Complaint. (See Declaration of Erica Katsuyama at ¶ 2).
 5 Counsel for Dr. Bholat and The Regents advised Plaintiff's courier they could not
 6 accept service of the Summons and Complaint on behalf of Dr. Bholat or The
 7 Regents. (See Katsuyama Decl. at ¶ 2). On or about August 28, 2018, counsel for
 8 Dr. Bholat and The Regents learned Plaintiff filed proof of service. (See Declaration
 9 of Geoffrey M. Hersch at ¶ 2). Counsel for Dr. Bholat and The Regents contacted
 10 Plaintiff to meet and confer regarding deficiencies in the Complaint and her
 11 insufficient attempts to serve Dr. Bholat and the Regents. (See Hersch Decl. at ¶ 2).
 12 On August 29, 2018, counsel for Dr. Bholat and The Regents sent correspondence to
 13 Plaintiff in a further effort to meet and confer regarding deficiencies in the
 14 Complaint. (See Hersch Decl. at ¶ 6, "Meet and Confer" at Exhibit 1).

15 **IV. LEGAL STANDARD**

16 A defendant may assert defenses based on lack of subject-matter jurisdiction.
 17 (USCS Fed Rules Civ Proc R 12(b)(1)). A complaint must include a "short and plain
 18 statement of the grounds for the court's jurisdiction." (USCS Fed. Rules Civ. Proc.
 19 R. 8(a)(1)). "Federal courts are courts of limited jurisdiction. They possess only that
 20 power authorized by Constitution and statute... which is not to be expanded by
 21 judicial decree...." (*Kokkonen v. Guardian Life Ins. Co. of Am.* (1994) 511 U.S.
 22 375, 377). A defendant may attack subject-matter jurisdiction based solely on the
 23 jurisdictional allegations contained in the complaint or the Court's subject matter
 24 jurisdiction based on extrinsic facts without converting the motion into a motion for
 25 summary judgment. (*Westlands v. NRDC* (E.D. Cal. 2003) 276 F. Supp. 2d 1046,
 26 1049; *Safe Air For Everyone v. Meyer* (9th Cir. 2004) 373 F.3d 1035, 1039). In
 27 evaluating a factual attack on subject-matter jurisdiction, the Court is not required to
 28

1 presume the truthfulness of the jurisdictional allegations in the Complaint. (*Safe Air*
 2 *For Everyone* (9th Cir. 2004) 373 F.3d at 1039).

3 Further, Federal Courts may dismiss a case based on pending state
 4 proceedings. (*Younger v. Harris* (1971) 401 U.S. 37). Similarly, a Federal Court
 5 may refrain from exercising jurisdiction where a complaint was filed in a separate
 6 court involving similar parties and issues. (*Kerotest Mfg. Co. v. C-O-Two Fire*
 7 *Equipment Co.* (1952) 342 U.S. 180, 183–84).

8 A motion to dismiss under Federal Rules of Civil Procedure Rule 12(b)(6)
 9 tests the legal sufficiency of the claims asserted in the complaint. Dismissal is
 10 proper when the complaint either fails to allege a cognizable legal theory or fails to
 11 allege sufficient facts to support a cognizable legal theory. (See *Shroyer v. New*
 12 *Cingular Wireless Svcs., Inc.* (9th Cir. 2010) 622 F.3d 1035, 1041). Moreover, a
 13 Rule 12(b)(6) motion is appropriate where the complaint states allegations
 14 disclosing some absolute defense or bar to recovery. (See *Weisbuch v. County of Los*
 15 *Angeles* (9th Cir. 1997) 119 F.3d 778, 783, n.1; *Hensley Mfg. v. ProPride, Inc.* (6th
 16 Cir. 2009) 579 F.3d 603, 613).

17 To survive a motion to dismiss, a complaint must contain sufficient factual
 18 matter to “state a claim to relief that is plausible on its face.” (*Bell Atlantic Corp. v.*
 19 *Twombly* (2007) 550 U.S. 544, 570). “A claim has facial plausibility when the
 20 plaintiff pleads factual content that allows the court to draw the reasonable inference
 21 that the defendant is liable for the misconduct alleged.” (*In re American Apparel,*
 22 *Inc. Shareholder Litigation* (C.D. Cal. 2013) 2013 U.S. Dist. LEXIS 6977, *32).

23 **V. ARGUMENT**

24 **A. Plaintiff Cannot Demonstrate the Court has Subject Matter**
Jurisdiction over this Action because The Regents and Dr. Bholat
are Immune from Suit.

27 “It is to be presumed that a cause lies outside [a federal court’s] limited
 28

1 jurisdiction... and the burden of establishing the contrary rests upon the party
 2 asserting jurisdiction...." (*Kokkonen* (1994) 511 U.S. at 377). "The Judicial power
 3 of the United States shall not be construed to extend to any suit in law or equity,
 4 commenced or prosecuted against one of the United States by Citizens of another
 5 State, or by Citizens or Subjects of any Foreign State." (USCS Const. Amend. 11;
 6 *Brooks v. Sulphur Springs Valley Electric Coop.* (9th Cir. 1991) 951 F.2d 1050,
 7 1053 ("Though its language might suggest otherwise, the Eleventh Amendment has
 8 long been construed to extend to suits brought against a state by its own citizens, as
 9 well as by citizens of other states.")). "Section 1983 provides a federal forum to
 10 remedy many deprivations of civil liberties, but it does not provide a federal forum
 11 for litigants who seek a remedy against a State for alleged deprivations of civil
 12 liberties." (*Will v. Mich. Dep't of State Police* (1989) 491 U.S. 58, 66).

13 The Regents is immune from suit because the Eleventh Amendment prohibits
 14 federal Courts from hearing suits against a state brought by one of its citizens which
 15 extends to agencies or departments of the state, and immunity was not waived by 42
 16 U.S.C. § 1983. "It is clear, of course, that in the absence of consent a suit in which
 17 the State or one of its agencies or departments is named as the defendant is
 18 proscribed by the Eleventh Amendment." (*Pennhurst State Sch. & Hosp. v.*
 19 *Halderman* (1984) 465 U.S. 89, 100; Cal Const. Art. IX § 9(a) (The University of
 20 California is a public trust administered by "The Regents of the University of
 21 California."); Cal. Gov. Code § 3202(b) [emphasis added] (defining the University
 22 of California as a *state agency*); *In re Estate of Royer* (1899) 123 Cal. 614, 620
 23 ("recognizing that the University of California "may be unique, but it is nevertheless
 24 an instrumentality of the state created by the legislature acting within its just
 25 powers.")). Plaintiff alleges The Regents—whom Plaintiff erroneously names as UC
 26 Regents and the Family Medicine IMG Program at UCLA School of Medicine—
 27 violated section 42 U.S.C. § 1983. (See Complaint at p. 2–3 and 6). Plaintiff cannot
 28

1 demonstrate this Court has subject matter jurisdiction to hear this case because The
 2 Regents is an agency of the State of California which is immune from suit in federal
 3 Court under the Eleventh Amendment and that immunity was not waived by 42
 4 U.S.C. § 1983.

5 Similarly, Dr. Bholat is immune from suit in federal court because Eleventh
 6 Amendment immunity extends to an individual's acts in their official capacity and
 7 Dr. Bholat is entitled to absolute immunity in connection with the state license
 8 proceedings. “[A] suit against a state official in his or her official capacity is not a
 9 suit against the official but rather is a suit against the official's office.” (*Will* (1989)
 10 491 U.S. at 70–71). “[S]tate medical boards and their officers enjoy absolute
 11 immunity for the non-ministerial acts that they commit in performing their duties.”
 12 (*Yoonessi v. Albany Medical Ctr.* (C.D. Cal. 2005) 352 F. Supp. 2d 1096, 1100
 13 *citing Mishler v. Clift* (9th Cir. 1999) 191 F.3d 1003, 1008 (finding a state medical
 14 board member's “act of signing the disciplinary complaint under penalty of perjury
 15 is entitled to absolute immunity.”)). Plaintiff claims Dr. Bholat violated section 42
 16 U.S.C. § 1983 while acting in her official as a member of MBOC and individual
 17 capacity. (See Complaint at p. 2–3 and 6). Significantly, the only allegations
 18 regarding Dr. Bholat relate to her actions as a member of MBOC in signing the
 19 order requiring Plaintiff to undergo a psychiatric evaluation. (See Complaint at p. 2,
 20 4, and 6). Consequently, Plaintiff cannot demonstrate subject-matter jurisdiction
 21 because Dr. Bholat is entitled to immunity as a member of MBOC.

22 **B. The Court Should Abstain from Exercising Jurisdiction Pursuant**
 23 **to *Younger v. Harris* because the State License Proceedings**
 24 **Implicate Important State Interests, the State Proceedings are**
 25 **Ongoing, and Plaintiff may Address any Federal Claims in the**
 26 **State Proceedings.**

27 “Since the beginning of this country's history Congress has, subject to few
 28 13

1 exceptions, manifested a desire to permit state courts to try state cases free from
 2 interference by federal courts.” (*Younger v. Harris* (1971) 401 U.S. 37, 43). Federal
 3 courts examine three factors to determine whether to abstain from interfering in state
 4 proceedings:

5 (1) the nature of the state proceedings in order to determine whether
 6 the proceedings implicate important state interests, (2) the timing of
 7 the request for federal relief in order to determine whether there are
 ongoing state proceedings, and (3) the ability of the federal plaintiff to
 litigate its federal constitutional claims in the state proceedings.

8 (*Kenneally v. Lungren* (1992) 967 F.2d 329, 331 *citing Younger v. Harris* (1971)
 9 401 U.S. 37 and *Middlesex County Ethics Committee v. Garden State Bar*
 10 *Association* (1982) 457 U.S. 423, 432 (The Court evaluated application of *Younger*
 11 abstention to state bar disciplinary proceedings finding “[t]he policies underlying
 12 *Younger* are fully applicable to noncriminal judicial proceedings when important
 13 state interests are involved.”)).

14 First, abstention is warranted because state medical board proceedings
 15 implicate important state interests. “Since the earliest days of regulation the Board
 16 has been charged with the duty to protect the public against incompetent, impaired,
 17 or negligent physicians, and, to that end, has been vested with the power to revoke
 18 medical licenses on grounds of unprofessional conduct....” (*Arnett v. Dal Cielo*
 19 (1996) 14 Cal.4th 4, 7; Cal Bus & Prof Code § 2001.1 (“Protection of the public
 20 shall be the highest priority for the Medical Board of California in exercising its
 21 licensing, regulatory, and disciplinary functions.”); Cal Bus & Prof Code § 2004
 22 (stating responsibilities of the medical board in connection with disciplinary
 23 proceedings)). Plaintiff alleges The Regents and Dr. Bholat violated section 42
 24 U.S.C. § 1983 due to the Accusation that was filed with MBOC and her psychiatric
 25 evaluation in connection with the ongoing state license revocation proceedings. (See
 26 Complaint at p. 4). The state license revocation proceedings implicate important
 27 state interests because the Board has long been charged with the duty to protect the

1 public and has been vested with the power to revoke licenses to that end. Indeed,
 2 California statutorily recognizes protection of the public as the highest priority of
 3 the medical board.

4 Second, the Court should abstain from exercising jurisdiction because the
 5 state license proceedings are ongoing. “*Younger* abstention is required... only when
 6 state court proceedings are initiated ‘before any proceedings of substance on the
 7 merits have taken place in the federal court.’” (*Haw. Hous. Auth. v. Midkiff* (1984)
 8 467 U.S. 229, 238 [internal citation omitted]). The underlying Accusation was filed
 9 on January 9, 2018. Plaintiff filed the Complaint on June 4, 2018. (See Complaint;
 10 see also Request for Judicial Notice at Exhibit 2). MBOC’s public records
 11 demonstrate the state administrative proceedings related to Plaintiff’s medical
 12 license are ongoing. (See Request for Judicial Notice at Exhibit 1). As a result,
 13 abstention is warranted because the state license proceedings were initiated several
 14 months before this action and have not concluded.

15 Third, abstention applies because Plaintiff may adequately pursue her claims
 16 in state proceedings. In *Kenneally v. Lungren*, a licensed physician in California
 17 appealed a District Court ruling pursuant to *Younger* dismissing his Complaint to
 18 enjoin MBOC administrative proceedings on the grounds that the administrative
 19 proceedings did not permit him to adequately present his constitutional claims that
 20 the proceedings violated rights guaranteed to him under the Fourteenth Amendment.
 21 (*Kenneally v. Lungren* (1992) 967 F.2d 329, 331). On appeal, the Ninth Circuit
 22 Court recognized the administrative board could receive evidence in light of his
 23 constitutional challenges or seek review in state court, holding “even if a federal
 24 plaintiff cannot raise his constitutional claims in state administrative proceedings
 25 that implicate important state interests, his ability to raise the claims via state
 26 judicial review of the administrative proceedings suffices.” (*Kenneally v. Lungren*
 27 (1992) 967 F.2d 329, 332–33 citing Code Civ. Proc. § 1094.5). Similarly, Plaintiff

1 claims The Regents and Dr. Bholat violated section 42 U.S.C. § 1983 in connection
 2 with the state license proceedings. (See Complaint at p. 4 and 6). As a result, the
 3 Court should abstain from exercising jurisdiction because the state proceedings
 4 permit Plaintiff to address her claims and, even if Plaintiff could not, she may seek
 5 review in state court.

6 **C. The Court may Dismiss or Stay the Action Pursuant to *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.* because Plaintiff Filed the Original Complaint Against Substantially the Same Parties Based on Substantially Similar Facts and Plaintiff's Second Complaint Represents Her Attempt to Forum Shop.**

7 “The first-to-file rule was developed to ‘serve[] the purpose of promoting
 8 efficiency well and should not be disregarded lightly.’” (*Alltrade, Inc. v. Uniweld Prods.* (1991) 946 F.2d 622, 625 *citing Church of Scientology v. United States Dep't of the Army* (1979) 611 F.2d 738, 750).

9 Wise judicial administration, giving regard to conservation of judicial
 10 resources and comprehensive disposition of litigation, does not counsel
 11 rigid mechanical solution of such problems. The factors relevant to
 12 wise administration here are equitable in nature. Necessarily, an ample
 13 degree of discretion, appropriate for disciplined and experienced
 14 judges, must be left to the lower courts.

15 (*Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.* (1952) 342 U.S. 180, 183–84).
 16 In determining whether to apply the first-to-file rule, the Court must consider three
 17 threshold factors: “(1) the chronology of the two actions; (2) the similarity of the
 18 parties; and (3) the similarity of the issues.” (*Ward v. Follett Corp.* (1994) 158
 19 F.R.D. 645, 648; *compare Hilton v. Apple, Inc.* (2013) 2013 U.S. Dist. LEXIS
 20 142354 at 23 (“The first-to-file rule only requires that the parties between the earlier
 21 and later cases be substantially similar.”)). The Accusation against Plaintiff was
 22 filed on January 9, 2018. (See Request for Judicial Notice at Exhibit 2). Plaintiff
 23 filed the first Complaint in the United States District Court for the Eastern District
 24 of California on January 9, 2018. (See Exhibit 2).

1 of California on January 17, 2018 against Dr. Bholat, MBOC, and numerous other
 2 defendants. (See Request for Judicial Notice at Exhibit 3). Plaintiff's Complaint
 3 asserts several claims under 42 U.S.C. § 1983 for depriving her of equal protection,
 4 violating her right to privacy, violating her right to freedom of speech, press, and to
 5 peaceably assemble, and violating her right to work. (See Request for Judicial
 6 Notice at Exhibit 3, pp. 12–15). As a result, dismissing or staying this action is
 7 appropriate because Plaintiff filed the prior Complaint on January 17, 2018 against
 8 Dr. Bholat and MBOC based on the same allegations related to the Accusation
 9 against her in the state licensing proceedings.

10 Further, it would be appropriate for the Court to refrain from exercising
 11 jurisdiction because the present Complaint represents Plaintiff's attempt to forum
 12 shop.

13 [I]f the duplicative litigation results from the plaintiff's own failure to
 14 follow the rules, such as by repeatedly failing to timely serve process,
 15 a prejudice-based dismissal may be appropriate. Blatant forum
 shopping or gamesmanship by one or both parties may also merit such
 a result.

16 (*Chavez v. Dole Food Co.* (3rd Cir. 2016) 836 F.3d 205, 221). On March 5, 2018,
 17 Plaintiff filed a Motion for Change of Venue to transfer the matter to the United
 18 States District Court for the Central District of California. (See Request for Judicial
 19 Notice at Exhibit 4). On April 6, 2018, MBOC filed a Motion to Dismiss or Stay
 20 the Action arguing, in relevant part, that *Younger* abstention applies as the state
 21 license proceedings are still pending, MBOC and those acting on its behalf are
 22 immune from suit under the Eleventh Amendment, and Plaintiff's Complaint fails to
 23 state a claim upon which relief may be granted. (See Request for Judicial Notice at
 24 Exhibit 5). Subsequently, Plaintiff filed the present action with this Court shortly
 25 before her Motion for Change of Venue was denied and Judge Kellison
 26 recommended dismissing the Eastern District Complaint. (See Complaint; see also
 27 Request for Judicial Notice at Exhibit 7; Request for Judicial Notice at Exhibit 8).

1 Dismissal is therefore proper because Plaintiff's Complaint before this Court
 2 represents an attempt to forum shop, particularly considering the Complaint was
 3 filed against nearly identical parties based on the same underlying allegations
 4 shortly before her Motion for Change of Venue to this Court was denied by the
 5 Eastern District.

6 **D. Plaintiff's Complaint Should be Dismissed because Service of**
 7 **Process of the Summons and Complaint on Dr. Bholat and The**
 8 **Regents was Insufficient.**

9 Under Rule 4, a state entity must be served by delivering a copy of the
 10 summons and complaint to the chief executive officer or by serving a copy of each
 11 in a manner provided by state law. (USCS Fed. Rules Civ. Proc. R. 4(j)). "A
 12 summons may be served on a public entity [including The Regents] by delivering a
 13 copy of the summons and of the complaint to the clerk, secretary, president,
 14 presiding officer, or other head of its governing body." (Cal. Code Civ. Proc. §
 15 416.50(a)). In this case, Plaintiff attempted to serve the Summons and Complaint on
 16 The Regents by mailing copies requesting Acknowledgement of Receipt and by
 17 dropping copies at the office of counsel for The Regents. (See Khosrowpour Decl. at
 18 ¶ 4; see also Rodgers Decl. at ¶ 2; Katsuyama Decl. at ¶ 2). Plaintiff was repeatedly
 19 advised that counsel for The Regents did not have authority to accept service. (See
 20 Khosrowpour Decl. at ¶¶ 2–3; see also Rodgers Decl. at ¶ 2; Katsuyama Decl. at ¶
 21 2). As a result, Plaintiff's Complaint should be dismissed because she failed to
 22 adequately serve the Summons and Complaint on The Regents under Federal Rule
 23 4(j) or California Code of Civil Procedure section 416.50(a).

24 Similarly, an individual may be served by complying with state law for
 25 service or by delivering a copy of the Summons and Complaint personally, leaving a
 26 copy at the individual's home or abode with a competent individual that resides
 27 there, or delivering a copy to an authorized agent. (USCS Fed. Rules Civ. Proc. R.

1 4(e)). Plaintiff also attempted to serve Dr. Bholat with the Summons and Complaint
 2 by mailing copies requesting Acknowledgement of Receipt and by dropping copies
 3 at the office of counsel for Dr. Bholat. (See Khosrowpour Decl. at ¶ 4; see also
 4 Rodgers Decl. at ¶ 2; Katsuyama Decl. at ¶ 2). Again, Plaintiff was advised on
 5 multiple occasions that counsel for Dr. Bholat did not have authority to accept
 6 service. (See Khosrowpour Decl. at ¶¶ 2–3; see also Rodgers Decl. at ¶ 2;
 7 Katsuyama Decl. at ¶ 2). Consequently, the Complaint should be dismissed because
 8 Plaintiff has failed to demonstrate sufficient service of process on Dr. Bholat.

9 Despite the deficient service attempts, Plaintiff filed a proof of service as to
 10 Dr. Bholat and The Regents on August 20, 2018, indicating the parties
 11 acknowledged receipt of the Summons and Complaint pursuant to California Code
 12 of Civil Procedure section 415.30. Significantly, the provision established the
 13 requirements for Plaintiff to serve by mail provided they obtain Acknowledgement
 14 of Receipt. (Cal. Code Civ. Proc. § 415.30). Dr. Bholat and The Regents have not
 15 executed the acknowledgment of receipt and none are attached to any proof of
 16 service filed by Plaintiff. (See Khosrowpour Decl. at ¶ 4). Nonetheless, Plaintiff
 17 filed a proof of service of the Summons and Complaint as to Dr. Bholat and The
 18 Regents, without executed copies of a Notice & Acknowledgement of Service. (See
 19 Proof of Service). As a result, Plaintiff's Complaint should be dismissed because Dr.
 20 Bholat and The Regents have not been sufficiently served.

21 E. **Plaintiff's Complaint Fails to State a Claim Upon which Relief Can**
 22 **be Granted because The Regents and Dr. Bholat are Immune from**
 23 **Suit and Plaintiff does not Allege Sufficient Facts to Demonstrate a**
 24 **Claim Under 42 U.S.C. §1983.**

25 “A pleading that states a claim for relief must contain... a short and plain
 26 statement of the claim showing that the pleader is entitled to relief...” (USCS Fed.
 27 Rules Civ. Proc R. 8(a)(2)). To establish a claim under 42 U.S.C. § 1983, a plaintiff
 28

1 must show that “(1) acts by the defendants (2) under color of state law (3) deprived
 2 [them] of federal rights, privileges or immunities [and] (4) caused [them] damage.”
 3 (*Thornton v. City of St. Helens* (2005) 425 F.3d 1158, 1163–64). “Federal courts are
 4 courts of limited jurisdiction. They possess only that power authorized by
 5 Constitution and statute....” (*Kokkonen* (1994) 511 U.S. at 377). In *Will v. Mich.
 6 Dep’t of State Police*, the Court determined that 42 U.S.C. § 1983 does not subject
 7 States or state officials to suits in federal courts because “a State [or state official
 8 acting in their official capacity] is not a ‘person’ within the meaning of § 1983.”
 9 (*Will* (1989) 491 U.S. at 65–66). Similarly, state medical board members are
 10 generally entitled to absolute immunity for actions in performing their duties,
 11 including signing disciplinary complaints. (*Yoonessi* (C.D. Cal. 2005) 352 F. Supp.
 12 2d at 1100 *citing Mishler* (9th Cir. 1999) 191 F.3d at 1008). Plaintiff alleges The
 13 Regents and Dr. Bholat, while acting both in her official and individual capacity,
 14 violated 42 U.S.C. § 1983. (See Complaint at p. 2, 4, and 6). Plaintiff’s Complaint
 15 therefore fails to state a claim upon which relief can be granted because The Regents
 16 and Dr. Bholat acting, in her official capacity, are not considered persons subject to
 17 suit in federal court under 42 U.S.C. § 1983. Plaintiff’s complaint also fails to state a
 18 claim upon which relief can be granted because Dr. Bholat is entitled to absolute
 19 immunity for actions in performing her duties as a medical board member, including
 20 signing an order requiring Plaintiff to undergo a psychiatric evaluation.

21 “Section 1983 is not itself a source of substantive rights, but merely provides
 22 a method for vindicating federal rights elsewhere conferred. The first step in any
 23 such claim is to identify the specific constitutional right allegedly infringed.
 24 (*Albright v. Oliver* (1994) 510 U.S. 266, 271 [internal quotation marks omitted]). In
 25 this case, Plaintiff does not allege any facts demonstrating the violation of a
 26 particular federal law or constitutional right. (See Complaint). Rather, Plaintiff
 27 evidently claims she lost business after an Accusation was filed with MBOC. (See
 28

1 Complaint). As a result, Plaintiff's Complaint is deficient in that it does not
 2 articulate the violation of a particular federal law or constitutional right.

3 Arguably, the allegations in the Complaint could be construed as a claim for
 4 violation of the Fourteenth Amendment of the United States Constitution. "A person
 5 deprives another 'of a constitutional right, within the meaning of section 1983, if he
 6 does an affirmative act, participates in another's affirmative acts, or omits to perform
 7 an act which he is legally required to do that *causes* the deprivation of which [the
 8 plaintiff complains].' The inquiry into causation must be individualized and focus
 9 on the duties and responsibilities of each individual defendant whose acts or
 10 omissions are alleged to have caused a constitutional deprivation." (*Leer v. Murphy*
 11 (1988) 844 F.2d 628, 633 [citation omitted]). Here, Plaintiff claims she lost business
 12 after an Accusation was filed with MBOC, which Dr. Bholat did not initiate. (See
 13 Complaint at pp. 4–3; see also Request for Judicial Notice at Exhibit 2). Further,
 14 Plaintiff does not allege The Regents was directly involved in filing the Accusation.
 15 (See Complaint) As a result, Plaintiff fails to state a claim upon which relief can be
 16 granted because she does not state facts demonstrating Dr. Bholat or The Regents
 17 caused a constitutional deprivation, particularly considering Dr. Bholat did not
 18 initiate the Accusation and The Regents had no involvement in the state licensing
 19 proceedings.

20 **VI. CONCLUSION**

21 Defendants respectfully request this Court grant the Motion to Dismiss with
 22 respect to Dr. Bholat and The Regents. Plaintiff's Complaint should be dismissed
 23 because, as detailed herein, Plaintiff has not and cannot demonstrate the Court has
 24 subject matter jurisdiction to hear this case. Further, it would be appropriate for this
 25 Court to abstain from exercising jurisdiction pursuant to *Younger v. Harris* (1971)
 26 401 U.S. 37 and *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.* (1952) 342 U.S.
 27 180. Moreover, procedurally, Plaintiff has not sufficiently served Dr. Bholat or The

1 Regents, which independently supports dismissal of this action. Finally, Plaintiff's
2 Complaint fails to state a claim upon which relief can be granted.

3 If, for whatever reason, the Court is not inclined to dismiss the action, Dr.
4 Bholat and The Regents request it be stayed until the state administrative
5 proceedings are concluded and Plaintiff has sought judicial review, if at all, in state
6 court, and the action in the United States District Court for the Eastern District of
7 California has concluded.

8

9 DATED: September 7, 2018 Respectfully submitted,

10 LEWIS BRISBOIS BISGAARD & SMITH LLP
11

12

13 By: /s/ Alaleh T. Khosrowpour
14 Thomas G. Oesterreich
15 Alaleh T. Khosrowpour
16 Geoffrey M. Hersch
17 Attorneys for MICHELLE ANNE
18 BHOLAT, and THE REGENTS OF THE
19 UNIVERSITY OF CALIFORNIA
20 erroneously named as UC Regents and
UCLA School of Medicine Family
Medicine International Medical Graduate
Program

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1 DECLARATION OF ALALEH T. KHOSROWPOUR

2 I, ALALEH T. KHOSROWPOUR, declare as follows:

3 1. I am an attorney duly admitted to practice in this Court and all of the
4 courts of the State of California and I am a Partner with Lewis Brisbois Bisgaard &
5 Smith LLP, attorneys of record for Defendants, MICHELLE ANNE BHOLAT (“Dr.
6 Bholat”) and THE REGENTS OF THE UNIVERSITY OF CALIFORNIA (“The
7 Regents”) herein. The facts set forth herein are of my own personal knowledge, and
8 if sworn, I could and would competently testify thereto.

9 2. On or about July 18, 2018, I called Plaintiff HANNA RHEE
10 (“Plaintiff”) to discuss this matter and advised her that we do not have authority to
11 accept service of the Summons and Complaint on behalf of Dr. Bholat or The
12 Regents.

13 3. On or about July 18, 2018, I also sent an email to Plaintiff regarding
14 service of the Summons and Complaint. I informed Plaintiff that our office would
15 look into whether we could accept service and/or sign for waiver of service of the
16 Summons and Complaint on behalf of Dr. Bholat and The Regents, and that we
17 would contact her if we could. Since that time, I have not had any further contact
18 with Plaintiff.

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1 4. Based on the proof of service filed by Plaintiff as to Dr. Bholat and The
2 Regents, I am informed and believe that Plaintiff also attempted to serve the
3 Summons and Complaint on Dr. Bholat and The Regents by mailing copies with
4 Notice & Acknowledgment of Receipt to 1111 Franklin Street, 8th Floor, Oakland,
5 CA 94607-5200, on or about August 17, 2018. Executed copies have not been
6 provided to Plaintiff for either Dr. Bholat or The Regents.

7 I declare under penalty of perjury under the laws of the United States of
8 America that the foregoing is true and correct and that this declaration was executed
9 on September 7, 2018, at Costa Mesa, California.

ALALEH KHOSROPOUR

DECLARATION OF JESSICA RODGERS

I, JESSICA RODGERS, declare as follows:

3 1. I am a Legal Assistant with Lewis Brisbois Bisgaard & Smith LLP,
4 attorneys of record for Defendants, MICHELLE ANNE BHOLAT (“Dr. Bholat”)
5 and THE REGENTS OF THE UNIVERSITY OF CALIFORNIA (“The Regents”)
6 herein. The facts set forth herein are of my own personal knowledge, and if sworn, I
7 could and would competently testify thereto.

8 2. On or about August 17, 2018, Plaintiff HANNA RHEE ("Plaintiff")
9 sent a courier to our office to serve the Summons and Complaint on Dr. Bholat and
10 The Regents at our office. I advised Plaintiff's process server that we do not have
11 authority to accept service on behalf of Dr. Bholat or The Regents and that they
12 would need to properly serve the Summons and Complaint on Dr. Bholat and The
13 Regents.

14 I declare under penalty of perjury under the laws of the United States of
15 America that the foregoing is true and correct and that this declaration was executed
16 on September 17, 2018, at Costa Mesa, California.

California.



JESSICA RODGERS

DECLARATION OF ERICA KATSUYAMA

I, ERICA KATSUYAMA, declare as follows:

3 1. I am a Legal Assistant with Lewis Brisbois Bisgaard & Smith LLP,
4 attorneys of record for Defendants, MICHELLE ANNE BHOLAT (“Dr. Bholat”)
5 and THE REGENTS OF THE UNIVERSITY OF CALIFORNIA (“The Regents”)
6 herein. The facts set forth herein are of my own personal knowledge, and if sworn, I
7 could and would competently testify thereto.

8 2. On or about August 24, 2018, Plaintiff HANNA RHEE (“Plaintiff”)
9 sent a courier to our office with copies of the Summons and Complaint. I informed
10 Plaintiff’s courier we are not authorized to accept service of the Summons and
11 Complaint on behalf of Dr. Bholat or The Regents.

12 I declare under penalty of perjury under the laws of the United States of
13 America that the foregoing is true and correct and that this declaration was executed
14 on September X, 2018, at Costa Mesa, California. 



ERICA KATSUYAMA

DECLARATION OF GEOFFREY M. HERSCH

I, GEOFFREY M. HERSCH, declare as follows:

3 1. I am an attorney duly admitted to practice in this Court and all of the
4 courts of the State of California and I am an Associate with Lewis Brisbois Bisgaard
5 & Smith LLP, attorneys of record for Defendants, MICHELLE ANNE BHOLAT
6 (“Dr. Bholat”) and THE REGENTS OF THE UNIVERSITY OF CALIFORNIA
7 (“The Regents”) herein. The facts set forth herein are of my own personal
8 knowledge, and if sworn, I could and would competently testify thereto.

9 2. On August 28, 2018, our office learned Plaintiff HANNA RHEE
10 ("Plaintiff") filed proof of service of the Summons and Complaint as to Dr. Bholat
11 and The Regents, reflecting service on August 17, 2018. I called Plaintiff the same
12 date to meet and confer regarding deficiencies in her Complaint and insufficient
13 service of process on Dr. Bholat and The Regents. Plaintiff has not returned our
14 calls.

15 3. On August 29, 2018, our office sent correspondence to Plaintiff in a
16 further effort to meet and confer regarding deficiencies in the Complaint and
17 insufficient service of process on Dr. Bholat and The Regents. A true and correct
18 copy of our correspondence to Plaintiff is attached hereto as Exhibit "1."

19 I declare under penalty of perjury under the laws of the United States of
20 America that the foregoing is true and correct and that this declaration was executed
21 on September 1, 2018, at Costa Mesa, California.

GEOFFREY M. HERSCHE

27

DECLARATION OF GEOFFREY M. HERSCH IN SUPPORT OF MOTION OF
DEFENDANTS MICHELLE ANNE BHOLAT AND THE REGENTS OF THE
UNIVERSITY OF CALIFORNIA TO DISMISS OR STAY ACTION